IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO.22/2006
AND
CIVIL APPLICATION NO. 102/2006

1. Madkaikar Realtors Pvt. Ltd.,
   a Company incorporated under the
   Companies Act, 1956, having its
   Office at Ashiyana,
   Madkaikar Apartments,
   Behind Bom Jesus Basilica Church,
   Ella, Old Goa, Tiswadi, Goa;
   represented by its Director,
   Mrs. Janita P. Madkaikar,

2. Mrs. Janita P. Madkaikar,
   Director of Madkaikar Realtors Pvt. Ltd. ..... Appellants.

V/s.

Mr. Satish Vinayak Bhandare,
major in age, House No.171,
Dotor Bhat, Old Goa, Tiswadi, Goa. ..... Respondent.

Mr. S. K. Kakodkar, Senior Advocate with Mr. Amey Kakodkar, Advocate for the appellants.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Braganza, Advocate for the respondent.

CORAM : A.P. LAVANDE, J.

Date of reserving the Order :
28th April, 2006.

Date of pronouncing the Order :
5th May, 2006.

O R D E R :

By this appeal, the appellants who are the defendants in Special Civil Suit No.25/06/A before the Civil Judge, Senior Division, Panaji assail Order dated 4th April, 2006, passed on the application filed by the respondent-plaintiff seeking interim reliefs, granting partly the application for injunction filed by the plaintiff. The parties shall be, hereinafter, referred to as “the plaintiff” and “the defendants”.

2. The plaintiff filed the above suit seeking permanent and mandatory injunction and damages against the defendants and along with the said suit, the plaintiff also filed an application seeking several interim reliefs. The application was resisted by the defendants. After considering the material on record, the trial Court granted the injunction in terms of prayer clause (b).

3. Briefly, the case of the plaintiff is that the plaintiff is co-owner of the property bearing Survey No.100/0 and 103/0. The defendants are developing their property bearing Survey No.102/2 by constructing buildings thereon. The case of the plaintiff further is that about a week prior to filing of the suit, the defendants partly demolished compound wall situated on the eastern boundary of the defendants' property and started using the access road ('the suit

access') having initial breadth of about 15 metres and thereafter 10 metres, for the purpose of taking trucks to their property bearing Survey No.102/2. It is further the case of the plaintiff that the defendants by demolishing the said compound wall, caused damage to the said compound wall and also damaged the gutters in the plaintiff's property, thereby causing loss to the extent of Rs.1,50,000/-. It is the case of the plaintiff that the defendants have also encroached upon the Government property. The defendants resisted the claim of the plaintiff and it is the case of the defendants that the suit access has been used by the defendants for several years by way of easement, initially for the purpose of taking bullockcarts and last few years for the purpose of taking trucks etc., and the suit access is a public road. According the defendants, there are remnants of the compound wall and the same belonged to the owners who sold the property to the defendants. The trial Court by impugned Order granted the injunction restraining the defendants, their agents, servants, or any other person or persons acting on their behalf from using the suit access till further order of the Court. The impugned order has been passed mainly on the ground that the suit access belongs to the plaintiff and, therefore, there is a clear invasion of the proprietory rights by the defendants.

4. Mr. Kakodkar, learned Senior Counsel appearing on behalf

of the appellants-defendants submitted that the defendants have been using the suit access for several years and from October, 2005 the defendants have been using the suit access for taking trucks, carrying building materials in their property bearing Survey No.102/2. He further submitted that the plaintiff has not come with clean hands and has suppressed material facts inasmuch as it is the case of the plaintiff that the defendants started interfering with the suit access a week before filing of the suit, which was filed on 14.3.2006. Mr. Kakodkar further submitted that the plans which have been approved by the competent authorities seeking permissions for development of the properties by the plaintiff as well as the defendants, clearly disclose that there is an access of 15 metres which tapers to 10 metres and the same has been shown as public road. Therefore, Mr. Kakodkar submits that the defendants, even if it is considered that they have not established their easementary right in respect of the suit access, are entitled to use the suit access. Relying upon the plans and the NOC granted by the Town and Planning Department and the Village Panchayat of Se-Old-Goa, the learned Senior Counsel submitted that the suit access having been clearly shown in the approved plan of the plaintiff's property as public road, the public at large including the defendants are entitled to use the suit access and the plaintiff is not entitled to seek any restraint order against the defendants. He further submitted that having regard to the fact that

the materials on record clearly disclose that the defendants have constructed two storeyed building in their property bearing Survey No.102/2, it is difficult to believe that the defendants for the first time trespassed into the suit property by taking their trucks through the suit access only a week prior to filing of the suit. He, therefore, submits that the plaintiff is guilty of laches and there is acquiescence on the part of the plaintiff. In so far as loose stone wall between the two properties is concerned, the learned Senior Counsel submitted that the same belonged to the owners who sold the property to the defendants and, in any case, even if it is held that the same belongs to the plaintiff, no irreparable loss or injury could be caused if the defendants are permitted to use the suit access since there are only remnants of the compound wall on the eastern boundary of the defendants' property.

5. In support of his submissions, Mr. Kakodkar relief upon the following Judgments :

(1) Pt. Chet Ram Vashist (dead) by LRs., v. Municipal Corporation of Delhi., AIR 1995 SC 430

(2) `Down Mangor Valley, Residents' Welfare Association' and anr. v. Mormugao Municipal Council, Goa and ors., AIR 2002 Bombay 258;

(3) Unreported Judgment dated 8th November, 1983 in S**mt. Sheela H.N. Gaunekar v. Shri X.N. Contoco and other,** in Special Civil Application No.86 of 1983 and

(4) Order dated 11.1.1993 passed by the learned Single

Judge of this Court in **G.R. Sharam v. Dr. Manuel Francisco Dias and others**, in Appeal from Order No.1/1993.

6. Per contra, Mr. Coelho Pereira, learned Senior Counsel appearing on behalf of the respondent submitted that the suit access is the property of the plaintiff and the same is meant only for the plot owners of the plaintiff's property which cannot be used by the public at large. He further submitted that the Authorities could not have put a condition that the suit access must be used as public road and the Village Panchayat as well as the Town and Country Planning Department have no jurisdiction to impose such a condition and, even if such a condition is incorporated in the NOC/plans, the same is a nullity. The learned Senior Counsel further submitted that the conduct of the defendants clearly disentitles any relief to the appellants in this appeal. The learned Senior Counsel further submitted that the defendants have an access through the property bearing Survey No.101/3 which also belongs to the defendants. He submitted that the suit access is meant exclusively for the use of the plot owners of the plaintiff's property. Lastly, the learned Senior Counsel submitted that the impugned Order has been passed upon correct appreciation of facts and law and, therefore, no interference is called for in this appeal and in any case, the appellants are not

entitled to any interim relief.

7. I have considered the submissions made by the learned Senior Counsel on behalf of the appellants and the respondent. I have also perused the Judgments relied upon by the learned Counsel for the appellants. Having regard to the rival submissions, the main question which arises for consideration is whether the appellants are entitled to use the suit access ?

8. In **Pt. Chet Ram Vashist's case (supra)**, the Apex Court has observed thus :

> "6. Reserving any site for any street, open space, park, school, etc. in a lay-out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned lay-out plan."

The learned Single Judge of this Court while disposing of Appeal from Order in **G.R. Sharam 's case (supra),** in paragraph 7, has observed thus :

> "…. In my view the approval granted or to be granted by the Authorities is itself a pointer in this direction and there is no difficult in conceding that Courts should consider themselves bound by plans approved by competent authorities and promoters and developers are held bound to those plans. Therefore, more often it is a case where the Courts are required to decide the matter on its own facts."

9. In **G. R. Sharma's cas**e (supra), the learned Single Judge of this Court has held that the Court should rely upon the plan approved by the competent authorities and the promoters are also bound by the approved plans. In the present case, the NOC dated 28.9.2000 has been issued by the Town and Country Planning Department, Panaji in respect of sub-division of the property bearing Survey No.100 belonging to the plaintiff. Conditions 6 and 12 of the said NOC read as under :

> 6. Roads, open spaces and drains have to be developed as per the required standards and for the purpose.

12. All such roads shall be treated as public roads.

In the provisional NOC dated 17.10.2000 issued by the Village Panchayat of Se Old Goa to the plaintiff, it has been mentioned that the same is granted on the terms and conditions laid down in the NOC issued by the Senior Town Planner dated 28.9.2000. In the final NOC dated 13.7.2001 issued by the Village Panchayat of Se Old Goa, it has been mentioned that the permission is recommended as per the plan annexed thereto. In the said plan, the suit access has been shown. Moreover, Condition 17 of the NOC dated 4.10.2005 issued by the Town and Country Planning Department to the appellants in respect of the development in Survey No. 102/2 stipulates that no direct access shall be derived from the National Highway and the access shall be derived from the existing/internal road along the property on the eastern side. A perusal of these NOCs and the approved plan, on the basis of which the development of the properties of the plaintiff as well as the defendants is to be carried out establishes, prima facie, that the suit access has been shown as road and further that there is a clear stipulation that all the roads shall be treated as public roads and condition 12 in NOC dated 28.9.2000 provides that all such roads shall be treated as public roads. That being the position, prima facie, I find merit in the submission of the Mr. Kakodkar that the suit access has to be considered as an access meant for the public over which the plaintiff

cannot claim exclusive proprietory rights. In my opinion, prima facie, the ratio laid down by the Apex Court in P**t. Chet Ram Vashist's case (supra)**, is clearly attracted in the present case. At this stage, the parties as well as the Court will have to proceed on the basis of the approved plans, specially in the absence of any challenge from the plaintiff. I am unable to accept the submission of the learned Counsel appearing on behalf of the respondent that the Village Panchayat as well as the Town and Country Planning Department have no jurisdiction to impose such a condition that the private roads in the property of the plaintiff should be treated as public road. I am afraid in the absence of any challenge being thrown to the N.O.Cs/approved plan in respect of the property of the plaintiff, pursuant to which the plaintiff himself has developed his property, it is not possible to accept a collateral challenge on behalf of the plaintiff to the conditions imposed in the NOC issued to the plaintiff. If at all the plaintiff was aggrieved by any such condition, he ought to have challenged the conditions as being contrary to law before acting upon the NOCs issued by the Panchayat and before developing the property pursuant to the approved plans. Therefore, prima facie, I find merit in the submission of Mr. Kakodkar that the defendants are entitled to the suit access, by way of an access to their property. The trial Court, in the impugned Order, has not considered the effect of the NOCs issued by the Village Panchayat as well as the approved

plans in respect of the property of the plaintiff and the defendants. The trial Court has passed the impugned order mainly on the ground that the suit access is a part and parcel of the plaintiff's property and, therefore, any use of the suit access by the defendants would amount to invasion of the proprietary rights of the plaintiff. I am also unable to accept the submission of the learned Counsel appearing on behalf of the respondents that the roads shown in the approved plan of the plaintiff's property are exclusively meant for the benefit of the plot owners of the said property. Moreover, it is pertinent to note that the plan of the defendants which has been approved subsequent to that of the plaintiff's property, clearly stipulates that the defendants shall not use direct access from the National Highway, but they will use the existing internal road along the property on the eastern side. Prima facie, I am therefore, of the opinion that the defendants are entitled to use the suit access shown in the approved plan in respect of the property of the plaintiff as an access to the defendants' property.

10. However, one more aspect requires to be considered before considering the prayer for relief of stay sought for by the appellants. It is the case of the plaintiff that there was a compound of loose stones on the western boundary of their property, while it is the case of the defendants that there was no compound wall of stones,

but there were remnants showing existence of a loose compound wall and the same belonged to the owners who sold the property to the defendants. The dispute about the existence of the compound wall and as to its ownership can be adjudicated upon only at the end of the trial. But, at the same time, the claim for damages of Rs.1,50,000/- made by the plaintiff in the suit on account of damage to the compound wall as well as gutters cannot be totally ignored at the time of considering the grant of interim relief to the appellants.

11. Considering the legal and factual position, I am of the opinion that the defendants have made out a prima facie case for stay of the impugned order, subject to conditions and that the defendants will suffer irreparable loss and injury if the impugned order is not stayed.

11. Once it is held that the appellants are entitled to use the suit access, ordinarily there should be no difficulty in granting them incidental right to use the suit access. Therefore, considering the equities involved in the matter, it would be just and proper to permit the appellants to use the suit access by staying the impugned order subject to conditions, in order to protect the rights of the plaintiff in the event he succeeds in proving that the compound wall belongs to him.

12. Since the appeal involves arguable questions of law, the appeal is admitted and the Civil Application No.102/2006 filed by the appellants seeking interim relief is disposed of on the following terms:

Pending hearing and final disposal of the appeal, the impugned Order dated 4th April, 2006 passed by the Civil Judge, Senior Division Panaji in Special Civil Suit No. 25/06/A is stayed, subject to the appellants depositing an amount of Rs.1,50,000/- (Rupees one lakh fifty thousand only) in this Court. The stay of the impugned order shall be effective only after the appellants deposit the amount of Rs.1,50,000/- in this Court. Liberty to the parties to apply for early hearing of Appeal from Order No. 22/2006.

A.P. LAVANDE, J.

ssm.